

CAUTIOUS CREDITOR®

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GETTING READY FOR REVISED ARTICLE 9

Article 9 of the Uniform Commercial Code ("UCC") governs the validity, perfection, priority, and enforcement of consensual security interests in most types of personal property and fixtures. The first major revision of Article 9 in nearly 30 years is being introduced in state legislatures around the country, with a proposed uniform effective date of July 1, 2001. Indiana recently joined several other states that have enacted Revised Article 9, to become effective on July 1, 2001. The *Cautious Creditor*® will deal with various aspects of Revised Article 9 in the coming months. This issue provides an overview of some major changes and suggests practical steps that can be taken now to prepare for Revised Article 9.

Revised Article 9 Brings Changes in Scope, Substantive Rules and Procedure

Revised Article 9 covers more property and transactions than current Article 9. Some existing categories of collateral are expanded, and the revision covers new property rights previously governed by non-UCC law. Under current law, for example, the term "accounts" is limited to payment rights for goods sold or leased or services rendered, but accounts include additional payment obligations such as license fees and credit card receivables under the new law. Other new property rights covered by Revised Article 9 include deposit accounts, health care insurance receivables and commercial tort claims.

Transactions subject to Revised Article 9 as well as new types of transactions such as agricultural liens, consignments and true sales of promissory notes, health care insurance receivables and other "payment intangibles" (one of many new terms in Revised Article 9). Although certain general principles will continue to govern all secured transactions, Revised Article 9 contains clearer,

more detailed rules in many substantive areas and adds many special rules for different types of secured transactions.

There are significant procedural changes as well. Revised Article 9 has a new set of rules for the place of filing for perfection of security interests and provides a complex set of transition rules for maintaining the perfection of existing security interests. Although security agreements must describe the collateral at least by category, creditors with a blanket lien on all assets of the debtor may file financing statements using a generic "all assets" description. Following recent changes to other parts of the UCC, Revised Article 9 also recognizes emerging methods of electronic commerce and encourages the use of non-paper computer filing.

Improvement and Complexity

The revisions and new rules are intended to reduce transaction costs and the cost of credit by establishing greater certainty in financing transactions and more consistency among the states. However the improvements come at the cost of greater complexity, as evidenced by the increased number of definitions (up from approximately 50 in current Article 9 to 115 in the new uniform law) and substantive sections (up from 55 in current Article 9 to more than 120 in the new uniform law).

Drafting Tips

As the uniform effective date approaches, the *Cautious Creditor*® will provide more detailed information about Revised Article 9's new rules. In anticipation of Revised Article 9, there are provisions that creditors can incorporate into security agreements drafted before the effective date that will govern transactions after Revised Article 9 takes effect.

Revised Article 9 assumes that terms used in a security agreement are intended to have the meanings given to them under the law in effect when the security agreement was executed. Unless the security agreement provides otherwise, therefore, a category of collateral as defined under current law will not take on the expanded meaning of that category after Revised Article 9 becomes effective. Here are some drafting tips for cautious creditors:

- If the security agreement describes new types of property rights covered by Revised Article 9 that are not included in the corresponding collateral category under current Article 9, a filed financing statement that lists the category (or covers all of the debtor's assets) should be effective to perfect the secured party's interest in those additional property rights after Revised Article 9 takes effect.

- If the creditor has a blanket lien on all assets, add a reference to all of the debtor's assets in original financing statements in addition to collateral descriptions that meet the requirements of current law. The broad reference will pick up new property rights not covered by a specific category, so long as those property rights are described in the security agreement.

- Avoid the common practice of defining collateral categories (or the UCC itself) by reference to the version of the UCC in effect at the time of execution of the security agreement. Rather describe the category as "[category] as presently or hereafter defined in the UCC," and define the UCC in terms of "the Uniform Commercial Code as from time to time in effect in the State."

- If the agreement creates a security interest in proceeds, describe rights that currently are not proceeds but will be under Revised Article 9, such as distributions on stock, rental payments for leased equipment and rights arising out of licenses of property (e.g., royalties).

- If the debtor was formed or chartered by filing with a governmental authority (e.g., a corporation or limited liability company), include a representation about what type of entity the debtor is and its state of formation. The entity's location for purposes of filing financing statements,

including under the transition rules, will be the state of that entity's formation.

- If the debtor is an individual or an entity not formed by filing with a governmental authority, include a representation about the address of the individual's principal residence or the entity's chief executive office in order to establish the proper place of filing.

Comment

Revised Article 9 gives creditors greater latitude in secured transactions, provides clearer, more detailed rules in specialized areas, offers greater protection of certain security interests in bankruptcy, and resolves many problems under current Article 9 that have led to conflicting case law. Revised Article 9 also is much longer and more complex than current Article 9. Future issues of the *Cautious Creditor*® will cover in more detail areas such as expanded collateral types, perfection, choice of law, priorities, default and enforcement, changes in terminology, consumer transactions, the transition rules, and Indiana's deviations from the uniform law.

For more information in this area, please contact **Peggy J. Naile** at 317-236-2475, Internet: naile@imdr.com.

Ice Miller Donadio & Ryan's Creditors' Rights and Commercial Law Practice Group provides practical advice and aggressive representation to financial institutions, small businesses and regional and national industry on commercial law and credit-related matters. Ice Miller Donadio & Ryan welcomes your questions and comments about the Cautious Creditor®. Please direct them to Susan R. Brooke, Henry A. Efromymson, John M. Hakes, Michael J. Lewinski, Dennis H. Long, Peggy J. Naile, Dominic F. Polizzotto, Thomas H. Ristine, Richard J. Thrapp, Zeff A. Weiss, or Michael A. Wukmer at (317) 236-2100.

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